

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF VERMONT**

In re:)	
)	
HERMITAGE INN REAL ESTATE)	Chapter 7
HOLDING COMPANY, LLC,)	Case Nos. 19-10214 (CAB) and
)	19-10276 (CAB)
and)	Jointly Administered
)	
HERMITAGE CLUB, LLC,)	
)	
Debtors.)	
)	

MOTION OF BERKSHIRE BANK FOR RELIEF FROM AUTOMATIC STAY

Now comes Berkshire Bank (the “Bank”), by and through its undersigned counsel, and hereby moves for the entry of an order granting the Bank relief from the automatic stay pursuant to 11 U.S.C. §§ 362(d)(1) and (2) to permit the Bank to enforce its mortgage and security interest in its collateral including, but not limited to the continued prosecution of the foreclosure and replevin action against the Debtors’ properties filed in the Superior Court of Vermont, Windham Unit.

In support of this Motion, the Bank respectfully represents as follows:

A. Preliminary Statement

The Bank is a secured creditor of the Debtors as a result of certain loans made by the Bank to the Debtors and more particularly described herein. The Bank’s claims against the Debtors are secured by liens on substantially all of the Debtors’ assets. The Bank’s interest in the Debtors’ assets is not adequately protected due to the continuing diminution in the value of those assets, and the Debtors are unable to provide the Bank with adequate protection.

Accordingly, cause exists to grant the Bank relief from the automatic stay under 11 U.S.C. §

362(d)(1). Additionally, the Debtors have no equity in the property securing the Bank's claim and such property is not necessary to an effective reorganization, as no such effective reorganization is possible given the Debtors' Chapter 11 cases were converted to cases under Chapter 7 by Order of the Court on July 30, 2019 (Doc. # 189).

B. The Bank's Secured Claim

1. Hermitage Inn Real Estate Holding Company, LLC ("HIREHC"), one of the Debtors in these cases, is the owner of the former Haystack Mountain ski resort and related properties and assets, consisting of approximately 800+ acres in the aggregate, located in the Towns of Dover and Wilmington, Windham County, Vermont; the lodging establishments known as the Hermitage Inn (Dover, VT), the Snow Goose Inn (Dover, VT), Horizon Inn (Wilmington, VT), the Doveberry Inn (Dover, VT) (HIREHC is the sole member of the limited liability company that owns the Doveberry Inn); the golf course and buildings and amenities associated with the operation of the golf club (Wilmington, VT); and certain vacant lots, infrastructure, water rights, and rights under a long term lease with the Town of Wilmington to lease certain lands and premises associated with the operation of the ski area (Wilmington and Dover, VT) (the "Property" or the "Site"). HIREHC constructed a base lodge on the Property (the "Base Lodge") and other buildings and structures, and has development rights to construct other improvements on the Property (the "Proposed Improvements").¹

2. The street addresses of the real property assets described in paragraph 1 hereof are as follows: Ski Resort and Base Lodge - 10 and 183 Gatehouse Trail, Wilmington, VT; Hermitage Inn - 25 Handle Road, Dover, VT; Horizon Inn – 861 Route 9 East, Molly Stark

¹ The legal description of the mortgaged property is extensive and is described in detail in the Berkshire Bank Mortgage, which is attached to the Affidavit of Peter A. Landauer filed with this Motion.

Trail, Wilmington, VT; Snow Goose Inn - 259 Route 100, Dover, VT; Doveberry Inn - 284 Route 100, Dover, VT; Golf Course - 70 Spyglass Road, Wilmington, VT.

3. On or about September 30, 2013, HIREHC and the Bank entered into that certain Construction Loan Agreement (as amended through the date hereof, the “Loan Agreement”), pursuant to which the Bank agreed to make certain loans to HIREHC in the aggregate amount of up to \$20,000,000 (the “Original Loans”) to enable HIREHC to construct or complete construction of the Base Lodge and the Proposed Improvements. A true and accurate copy of the Loan Agreement is attached as Exhibit A to the Affidavit of Peter A. Landauer, First Vice President of the Bank, filed herewith (hereinafter, the “Landauer Affidavit”).

4. On or about December 3, 2014, the Bank and HIREHC amended the Loan Agreement, and bifurcated the Original Loans into: (i) a \$15,000,000 loan to finance the Base Lodge (the “Base Lodge Loan”), as evidenced by a Second Amended and Restated Promissory Note (Base Lodge Loan) dated December 3, 2014 made by HIREHC and payable to the order of the Bank (the “Second Amended and Restated Base Lodge Note”); and (ii) a \$5,000,000 revolving loan for costs incurred by HIREHC in connection with the construction of the Proposed Improvements (the “Revolving Loan”), as evidenced by a Second Amended and Restated Revolving Credit Promissory Note dated December 3, 2014 made by HIREHC and payable to the order of the Bank (the “Revolving Note”). A true and accurate copy of the Second Amended and Restated Base Lodge Note is attached to the Landauer Affidavit as Exhibit B.

5. On or about June 28, 2016, HIREHC executed and delivered to the Bank a Third Amended and Restated Promissory Note (Bridge Loan) in the principal amount of One Million Dollars (\$1,000,000) (the “Bridge Loan Note”), which Bridge Loan Note amended

and restated the Revolving Note in its entirety on a non-revolving basis. A true and accurate copy of the Bridge Loan Note is attached to the Landauer Affidavit as Exhibit C.

6. On or about July 18, 2017, pursuant to further borrowings and amendments to the Loan Agreement, HIREHC executed and delivered to the Bank an additional promissory note in the original principal amount of \$1,100,000 (the “Second Bridge Loan Note”). A true and accurate copy of the Second Bridge Loan Note is attached to the Landauer Affidavit as Exhibit D.

7. The loans evidenced by the Second Amended and Restated Base Lodge Note, the Bridge Loan Note and the Second Bridge Loan Note are hereinafter referred to as the “Bank Loans,” and the three Notes are collectively referred to hereinafter as the “Notes”.

8. As of July 9, 2019, the unpaid balance, including accrued and unpaid interest, late charges and certain capitalized expenses, due to the Bank under the Bank Loans is as follows:

	<u>Balance</u>
Second Amended and Restated Base Lodge Note:	\$18,177,054.17
Bridge Loan Note	\$1,116,186.16
Second Bridge Loan Note:	<u>\$1,168,852.54</u>
Total	\$20,462,092.87

(See, Landauer affidavit, Para. 11)

9. Interest accrues on the Notes at the rate the following per diem rates: Second Amended and Restated Based Lodge Note (\$2,536.99), Bridge Loan Note (\$232.86), and Second Bridge Loan Note (\$223.35), which collectively translates to \$84,396.00 in interest accrual for every thirty days. (See, Landauer Affidavit, Para. 12)

10. The balance due under the Second Amended and Restated Base Lodge Note includes \$2,593,120.29 in expenses that were incurred by the Bank from January of 2018 through September of 2018 in maintaining and preserving the Bank's Collateral (as defined below). (See, Landauer Affidavit, Para. 13)

11. The Bank has incurred \$1,615,209.08 in expenses since September of 2018 to preserve the Bank's Collateral (as defined below) and protects its interest under the Bank Loans. (See, Landauer Affidavit, Para. 14).

12. The total amount of the Bank's claim is no less than \$22,077,000 as of July 9, 2019. (See, Landauer Affidavit, Para. 17)

13. To secure all of the indebtedness and obligations due to the Bank under the Loan Agreement (collectively, the "Obligations"), HIREHC executed in favor of the Bank that certain Construction Mortgage and Security Agreement dated as of September 30, 2013, as amended by (i) that certain Amendment of Mortgage between HIREHC and the Bank dated as of April 30, 2014, (ii) that certain Second Amendment of Mortgage between HIREHC and the Bank dated as of November 12, 2014, (iii) that certain Third Amendment of Mortgage between HIREHC and the Bank dated as of December 3, 2014, (iv) that certain Fourth Amendment of Mortgage between HIREHC and the Bank dated December 4, 2015, (v) that certain Fifth Amendment of Mortgage between HIREHC and the Bank dated June 28, 2016, (vi) that certain Sixth Amendment of Mortgage between HIREHC and the Bank dated February 1, 2017, (vii) that certain Seventh Amendment of Mortgage between HIREHC and the Bank dated February 10, 2017, and (viii) that certain Eight Amendment of Mortgage between HIREHC and the Bank dated Jul 18, 2017, with respect to the Property (said Construction Mortgage and Security Agreement, as so amended through the date hereof,

being hereinafter referred to as the “Mortgage”). The Mortgage and all amendments thereto have been properly recorded with the Dover (Vermont) Land Records and the Wilmington (Vermont) Land Records, thereby properly perfecting the Bank’s rights under the Mortgage. Copies of the Mortgage and all amendments are attached as Exhibit F to the Landauer Affidavit.

14. The Mortgage covers all of the real estate owned by HIREHC and located at the Resort, with the exception of minor parcels of undeveloped land adjacent at the Resort and the Nordic Hills Lodge (the “Real Property Collateral”). Pursuant to the Mortgage, the Bank also has a lien on substantially all of the personal property owned by HIREHC (the “Personal Property Collateral”).

15. In connection with the Original Loans, on September 30, 2013, James Barnes, the principal of the Debtors (the “Guarantor”), executed a Guaranty in favor of the Bank, under which the Guarantor guaranteed the Obligations of HIREHC to the Bank under the Loan Agreement (the “Guaranty”), which Guaranty has been amended and restated through the date hereof, and continues in full force and effect with respect to the Bank Loans.

16. Also in connection with the Original Loans, on September 30, 2013, the Club executed a Security Agreement in favor of the Bank, under which the Club granted to the Bank a security interest and lien on all assets owned by the Club (the “HC Security Agreement,” and the “HC Collateral”), which HC Security Agreement continues in full force and effect. The HC Collateral, the Real Property Collateral and the Personal Property Collateral are collectively referred to herein as the “Bank’s Collateral.” A true and accurate copy of the HC Security Agreement is attached to the Landauer Affidavit as Exhibit G.

17. The Bank perfected its interest under the HC Security Agreement by filing UCC-1 Financing Statements with the Connecticut Secretary of State. The Bank perfected its security interest in the HIREHC personal property by filing UCC-1 Financing Statements with the Connecticut Secretary of State. True and accurate copies of such UCC-1 Financing Statements are attached to the Landauer Affidavit as Exhibit H.

18. The Debtors defaulted in the Obligations in September of 2016 and the Bank, the Debtors and the Guarantor entered into a series of forbearance agreements, with the last dated November 30, 2017. The Debtors ultimately failed to comply with the terms of these forbearance agreements and on February 23, 2018, the Bank commenced an action to foreclose its Mortgage in the Vermont Superior Court, Windham Division (the “State Court Foreclosure Action”).

19. On June 6, 2018, on request of the Bank, the State Court appointed Alan Tantleff of FTI Consulting Inc. as the Receiver for the Bank’s collateral (the “Receiver”).²

20. The Bank prosecuted the State Court Foreclosure Action until the involuntary petition was filed against HIREHC on May 22, 2019 (the “Involuntary Petition”).

21. Upon the filing of the Involuntary Petition, the Bank moved for an order retaining the Receiver in place to maintain the status quo and to continue to protect and preserve the Debtors assets, which motion was allowed by this Court at the hearing on the motion on May 30, 2019.

22. The Receiver has remained in place thus far in these cases.

23. The Debtors Chapter 11 cases were converted to cases under Chapter 7 by order of the Court on July 30, 2019 (Doc. # 189).

A. The Bank Should be Granted Relief From The Automatic Stay

² The Bank’s collateral represents substantially all of Debtor’s assets.

Section 362(d) of the Bankruptcy Code provides as follows:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –

- (1) for cause, including lack of adequate protection of an interest in property of such party in interest;
- (2) with respect to a stay of an act against property under subsection (a) of this section, if –
 - (A) the debtor does not have any equity in such property; and
 - (B) such property is not necessary to an effective reorganization;

11 U.S.C. §§ 362(d)(1) and (2).

1. Grounds for Relief Under Section 362(d)(1)

While “cause” is not defined in Section 362(d)(1), or anywhere else in the Bankruptcy Code, the term does specifically include lack of adequate protection as constituting cause under 362(d)(1). Similarly, “adequate protection” is not defined in the Bankruptcy Code, but examples of adequate protection are provided in Section 361 of the Bankruptcy Code, which provides that adequate protection may be provided by cash payments, or granting of replacement liens, to *protect the interest holder from a decrease in the value of such entities’ interest in such property.*

11 U.S.C. §361. (Emphasis supplied). In other words, adequate protection in any form is meant to protect a secured creditor, like the Bank, from a decrease in the value of the Bank’s interest in the Debtors’ property; to wit, the Bank’s Collateral.

The Bank’s interest in the Debtors’ property is the lien that the Bank has on the Bank’s Collateral securing the Bank’s claim. If the Bank’s Collateral is decreasing in value as a result of the automatic stay provisions of Section 361 of the Bankruptcy Code, then the Bank is entitled to adequate protection, and if the Debtors cannot provide the Bank with adequate protection, then cause exists to grant the Bank relief from the automatic stay under Section 362(d)(1) of the

Bankruptcy Code. The Debtors do not have any unencumbered assets, nor any income or cash with which they could provide adequate protection to the Bank.

As set forth in the Landauer Affidavit, the Bank, not the Debtors, have been paying the basic expenses necessary to preserve and protect the Bank's Collateral since April of 2018, and continuing during the pendency of these cases, including payment of real estate taxes, water and sewer charges, insurance, utilities and lease payments. The Debtors had and have no funds or operations to generate revenue to pay these most basic expenses. Absent payment of these most basic expenses, the value of the Bank's Collateral would be subject to immediate and rapid deterioration in value. If the Bank did not pay the real estate taxes or water and sewer charges, those unpaid charges would be secured by priming liens negatively impacting the Bank's interest in the Debtors' property. Absent payment of insurance and basic maintenance expenses, those assets would be subject to possible loss, deterioration and waste. As such, the only adequate protection being provided to the Bank at this time is being provided by the Bank itself. The Bank submits that the Debtors' inability to maintain and preserve their assets, forcing the Bank to do so at its own expense, constitutes cause for granting the Bank relief from the automatic stay under Section 362(d)(1) of the Bankruptcy Code.

2. Grounds for Relief Under Section 362(d)(2)

The Bank submits that it is entitled to relief from stay under Section 362(d)(2) as well because the Debtors do not have any equity in the Bank's Collateral, and the Bank's Collateral is not necessary to an effective reorganization. These cases are Chapter 7 cases and no reorganization of the Debtors' or the estates is possible or contemplated.

The Bank commissioned Colliers International ("Colliers") to appraise the Bank's Collateral and Colliers has prepared an appraisal report dated July 11, 2019 (the "Bank's

Appraisal”).³ The Bank’s Appraisal values the Bank’s collateral at \$23,650,000. Colliers had prepared a prior appraisal report, dated September of 2018, that ascribed a greater value to the Bank’s Collateral. There was a significant reduction in value in the Bank’s Appraisal from 2018 to 2019, because none of the Debtors’ assets are operating or currently in use, and they have not been for almost 16 months. A fundamental assumption in the Bank’s Appraisal in 2018 was that the resort would be open, operating and providing services to its members and receiving membership fees and dues in exchange. The same is true for the inns owned by the Debtors - they have a much greater value when up and operating rather than in a mothballed state. It is not surprising that the inns and ski resort owned by the Debtors will have significantly more value as operating assets rather than mothballed assets. However, the current state of those assets (which has been true now for almost 16 months) is mothballed and idle rather than up and operating.

Based upon the Bank’s Appraisal, there is little or no equity over and above the Bank’s secured claim of \$22,077,000. In addition to the secured debt owed to the Bank, there are \$17,230,051.96 in additional secured claims asserted against the Debtors’ real property assets. Attached hereto as Exhibit A are two spreadsheets showing the names and purported interests of parties known, or discovered after reasonable investigation, who may claim to have an interest in the Real Property Collateral as recorded with the Town of Wilmington Land Records and the Town of Dover Land Records. These liens (the Bank’s secured claim and the other recorded lien claims) total \$39,307,052. Accordingly, the Bank submits that there is no equity in the Debtors’ assets. Attached hereto as Exhibit B is a chart showing the names and purported interests of

³ The Bank’s Appraisal was submitted to the Court as Bank’s Exhibit No. 3 at the evidentiary hearing held on July 26, 2019, on the Debtors’ Motion for Final Order (I) Authorizing the Debtors to Obtain Post-Petition Financing Pursuant to 11 U.S.C. §§ 105(a), 362 and 364(c) and (d), (II) Granting Liens and Superpriority Claims to the DIP Lender Pursuant to 11 U.S.C. § 364(c), and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001. Copies of the Bank’s Appraisal will be made available to parties in interest upon request to counsel to the Bank.

parties known, or discovered after reasonable investigation, who may claim to have an interest in the Personal Property Collateral and HC Collateral.

As there is no equity in the Bank's Collateral, and the Bank's Collateral is not necessary to an effective reorganization, the Bank is entitled to relief from the automatic stay under Bankruptcy Code Section 362(d)(2).

In accordance with Vt. LBR 9013-1(b), counsel for Bank hereby certifies that she has contacted opposing counsel and made a good faith attempt to obtain a settlement, a stipulation to the relief sought, or some other resolution prior to filing of this motion but was unable to reach an amicable resolution.

The Bank hereby waives the thirty (30) day provision of 11 U.S.C. §362(e).

WHEREFORE, Berkshire Bank respectfully requests that the Court enter an Order: (a) Granting the Bank Relief from the Automatic Stay under 11 U.S.C. §§ 362(d)(1) and (2) to pursue its rights to obtain and liquidate the Bank's collateral under applicable non-bankruptcy law; and (b) providing such other relief as is just and reasonable.

Dated this 2nd day of August, 2019.

BERKSHIRE BANK

By its attorney's

By: /s/ Elizabeth A. Glynn
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CERTIFICATE OF SERVICE

I, Paul F. O'Donnell, III, hereby certify that on this 2nd day of August, 2019, I caused to be served a copy of the Motion of Berkshire Bank For Relief from the Automatic Stay filed herewith to be served by this Court's CM/ECF System, and on the following parties, which are the parties claiming an interest in the real or personal property subject to the Motion, by first class mail, postage prepaid.

/s/ Paul F. O'Donnell, III

Paul F. O'Donnell, III

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Green Mountain Power Corp. Charlotte B. Ancel, Reg. Ag 163 Acorn Lane Colchester, VT 05446	Gordon Bristol d/b/a Gordon Bristol Consulting 279 Sunset Lake Road Williamsville, VT 05362	David Manning, Inc. 965 Western Avenue Brattleboro, VT 05303
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